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State of New Hampshire
Department of Environmental Services
Water Council

SEP 01 2004

In Re: Application of USA Springs, Inc. for a Large Groundwater Permit and
Approval of Bottled Water Source

**SAVE OUR GROUNDWATER, BOARD OF DIRECTOR'S REVISED NOTICE
OF APPEAL**

The Board of Directors of Save Our Groundwater [SOG], a Non-profit Corporation established in Barrington, New Hampshire with a mailing address of, PO Box 182, Barrington 03825, hereby appeals to the Water Council on behalf of our members, the Decisions of the Department of Environmental Services Water Division to deny SOG's Motion for an Adjudicative Hearing [Attachment A] and SOG's Motion for Reconsideration [Attachment B]. The Department on August 9, 2004 issued its denials of both Motions [Attachment D], which were filed in response to the Departments decision of July 1, 2004 to grant to USA Springs Inc. a permit for a large groundwater withdrawal [Attachment C].

BACKGROUND

SOG filed an appeal with the NHDES to its decision of July 1, 2004 granting a Large Groundwater permit to USA Springs Inc. requesting that NHDES hold an Adjudicative Hearing in accord with Env-Ws 388.23. [Attachment A] On the same day SOG also filed a Motion for Rehearing with NHDES also appealing the decision of July 1, 2004 [Attachment B]. Both of these filings were submitted to Appeal the July 1, 2004 decision of NHDES [Attachment C]. In that decision NHDES granted a permit for a Large Groundwater Withdrawal, which is very unique in the short history of RSA 485-C. The

permit authorizes a withdrawal by USA Springs, Inc. of 357,528 gallons per day [113 million gallons per year] of water to be bottled for sale domestically or overseas. This will result in no recharge on the site, since the water is to be processed on the site and shipped out by truck [current authorization is for 60 trucks per day, 6 days a week]. In its decisions [Attachment C] NHDES rejects SOG' Motion for Adjudicative Hearing arbitrarily using faulty information on the Administrative Procedures Act, and also rejects the Motion for Rehearing by confusing the intent of various State Statutes which speak to the subject of appeal.

SOG has filed this appeal with the Water Council because the Water Council is the proper authority to review this important matter. Under RSA 21-O the Water Council is required to hear this appeal, this is consistent with the procedure of RSA 541 despite the arguments offered by NHDES in its decisions of July 1, 2004

ADJUDICATIVE HEARING

NHDES in denying SOG's motion [as well as Nottingham's see Attachment C] relies on an incorrect acceptance that Env-Ws 388.23f does not apply because RSA 541 governs the process. NHDES then quickly adds that only the applicant would be able to ask for the hearing. Noting that SOG had raised an "equal protection" and "due process" issues in its Motion [Attachment A], NHDES then finds that SOG and Nottingham are "not similarly situated" as the applicant, because the applicant is a "business". NHDES then states that the rule in question [Env-Ws388.23.f] is invalid citing a case decided some 16

years before the Administrative Procedures Act; RSA 541-A was enacted by the New Hampshire General Court.

A review of RSA 541-A states that Agency rules which have been properly filed “have the force of law” unless amended or revised. A review of the history of Env-Ws 388.23 shows no changes since the Rule was submitted by NHDES to the Joint Legislative Committee on Administrative Rules [JLCAR] in 2001. The rules were submitted by NHDES to implement RSA 485-C, which was enacted in 1998 by the General Court.

After completion of the review of the Rules by JLCAR the rule was adopted and filed with the director of legislative service and became effective on May 10, 2001. The rule has not been amended or revised and remains the same as it was in 2001.

As stated above, the rule has ‘the force of law’ and since JLCAR has not filed a Final Objection as provided in RSA 541-A, the rule “shall be prima facie evidence of the proper interpretation of the matter that they refer to” [RSA 541-A: 22 II]. This rule postdates the case cited by NHDES by some 15+ years. Therefore the subject matter addressed by the rule has been modified by the General Court and is the proper interpretation of the matter of Adjudicative Hearings. NHDES argument is outdated and the Water Council should order that an Adjudicative Hearing is proper at this time in the proceedings.

ROLE OF WATER COUNCIL

NHDES denied the Motion for Rehearing and has held that the issue should now go directly to the Supreme Court, bypassing the Water Council. This position is inconsistent with RSA 21-O and gives far too much weight to RSA 541. It is SOG's contention that a reading of both statutes would show that a hearing in accord with RSA 21-O is consistent with RSA 541, since the next step after the Water Council would be to the Supreme Court.

NHDES on page 9 of its July 9, 2004 denial of the Motion for Rehearing [Attachment D] goes out of its way to confuse the meaning of the various statutes involved in the question of "hearings". This is contrary to the opinion of our Supreme Court which has said "we do not construe statutes in isolation"[Big League Entm't v Brox Indus. [149 NH 480]. The Court has held that statutes should be construed "in harmony' with the overall statutory scheme [149 NH 480 at 483].

The Court has also held that when interpreting two statutes, which deal with similar subject matter, "construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statute" [Pennelli v. Town of Pelham 148 NH 365] Applying the above principles requires a finding of jurisdiction of this matter with the Water Council.

Under the provisions of RSA 21-O: 7,

“The Water Council shall hear and decide all appeals from department decisions relative to the functions and responsibilities of the division of water other than department decisions made under RSA 482-A relative to wetlands, in accordance with RSA 21-O: 14.”[Emphasis added]

Under RSA 21-O: 14, hearings before the Water Council shall be conducted in accordance with the provisions of RSA 541-A, governing adjudicative proceedings. Appeals from decisions of the Water Council are in accordance with the provisions of RSA 541.

The review of applications for large groundwater withdrawals is a function and responsibility of the division of water. Thus the provisions of RSA 21-O: 7 mandate that the Water Council hear this appeal.

The decision by the division to deny a request for an adjudicative hearing appears to exceed the discretion of the division, in this instance and taken with the approval described above can only be reviewed by Water Council as provided by RSA 21-O: 7.

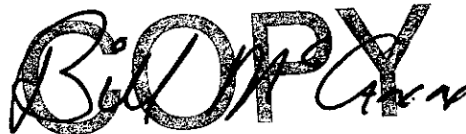
The conduct of an adjudicative proceeding before the Water Council under RSA 21-O: 7 is consistent with the provisions of RSA 485-C: 21 and regulation of the Department which provides that appeals from decisions on large groundwater withdrawal permit applications are to be conducted in accordance with RSA 541. Following the decisions of the Water Council, an aggrieved party may appeal under the provisions of RSA 541 to the New Hampshire Supreme Court.

WHEREFORE, SOG respectfully requests the Water Council:

To accept this appeal, grant SOG's motion for an Adjudicative Hearing,
[Attachment A] grant SOG's motion for Rehearing [Attachment B] and hold
hearings in accord with Env-Wc 200.

This appeal to the Water Council is based upon the reasons set forth in SOG's
Motion for an Adjudicative Hearing dated July 30, 2004 [Attachment A] and its
motion for Reconsideration dated July 30, 2004 [Attachment B]. In accord with
Env-Wc 203.03 copies of the decisions of the Department dated July 1, 2004
[Attachment C] and August 9, 2004 [Attachment D] are attached here to. A copy
of the Notice of Appeal has been forwarded to the Director of the Water Division
and to the Commissioner of the Department.

Respectfully submitted
SAVE OUR GROUNDWATER
BOARD OF DIRECTORS

A large, stylized, handwritten word "COPY" in capital letters. Overlaid on the "O" and "P" is a handwritten signature that appears to read "Bill McCann".

By Bill McCann, Board Member
On behalf of the
Board of Directors Pro Se

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed first class, and postage prepaid to Michael Nolin, NHDES, Harry Stewart, NHDES, Mark Beliveau, Esq., Armand M. Hyatt, Esq. E. Tupper Kinder, Esq. Tony Soltani, Esq. and Assistant Attorney General Richard Head.

COPY
Bill McCann

Bill McCann, Board Member